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Supreme Court, U.S.

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No. 98-678

IN THE
Supreme Court of the United States

LOS ANGELES POLICE DEPARTMENT,
Petitioner,

v.

UNITED REPORTING PUBLISHING CORP.,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

**BRIEF AMICUS CURIAE FOR
THE NEWSLETTER PUBLISHERS ASSOCIATION
IN SUPPORT OF RESPONDENT**

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INTEREST OF THE AMICUS CURIAE

The Newsletter Publishers Association ("NPA") represents the interests of publishers of more than 2,600 newsletters and specialized information services.¹ Collectively, members of the NPA publish on virtually every

¹ Pursuant to Supreme Court Rule 37.6, the NPA states that no counsel for a party to this action authored any portion of this brief *amicus curiae* and that no person or entity other than the NPA made a monetary contribution to the preparation or submission of this brief. The NPA further states that neither Respondent nor any other party to this action is a member of the NPA. Written consent of all parties to the filing of this brief *amicus curiae* has been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3(a).

major subject of public concern, with titles ranging from *AIDS Clinical Care* to the *Indian Subcontinent Monitor*, and from *Personal Finance* to the *Zoning Bulletin*. Contrary to this Court's precedent, the Court of Appeals held in this case that Respondent's newsletter and ancillary information service do not constitute "core" speech entitled to the full measure of protection afforded by the First Amendment. The Court of Appeals instead deemed Respondent's activities to constitute commercial speech entitled only to a lesser degree of constitutional protection. The Ninth Circuit's expansion of the category of speech deemed commercial devalues the speech not only of Respondent, but of a whole class of publications heretofore understood to be entitled to the full protection of the First Amendment.

SUMMARY OF ARGUMENT

This case tests the constitutionality of a California statute that purports to discriminate between commercial and non-commercial users who request access to certain information contained in arrest records. The courts below determined that Respondent, the publisher of a newsletter and proprietor of a related information service, is engaged in activities that constitute "commercial" speech, but that the statute in question infringes even the limited rights available to commercial speakers under the First Amendment. Regardless of how the Court resolves the constitutionality of the particular statute at issue, the NPA respectfully urges the Court to reject the reasoning of the courts below that led them to hold that newsletters like the one published by Respondent are anything other than core speech entitled to the full shelter of the First Amendment.

The conclusion of the courts below that Respondent's newsletter and ancillary information service are commer-

cial rather than core speech disregards the journalistic nature of such publications and constitutes an unwarranted and unworkable enlargement of the Court's commercial speech doctrine. More specifically, the courts below appear to have overlooked that Respondent's publications—its newsletter and ancillary information service—are not themselves advertisements or solicitations, the kind of invitations to commercial transactions to which this Court previously has limited application of the commercial speech doctrine. Indeed, the Ninth Circuit's expansion of the category of commercial speech to include *any* speech concerned solely with the economic interests of the speaker and its audience threatens to engulf a wide variety of news and information sources beyond the particular products published by Respondent. Further, the Ninth Circuit appears to have confused Respondent's publications with speech in which its customers ultimately may engage based on information they obtain from Respondent. Nothing in this Court's explication of the commercial speech doctrine supports such a broad reformulation of this less-favored category of speech.

The nature of newsletters as a class of periodicals underscores the constitutionally unacceptable result that follows from the Ninth Circuit's reasoning. Newsletters present important information on specialized subjects to their readers in a timely and comprehensible fashion, in the best tradition of the American press. As such, newsletters long have been understood by the courts to be entitled to invoke the full protection of the First Amendment in a variety of contexts. The Ninth Circuit's conclusion to the contrary disregards this well-established authority and devalues speech of unquestionable public importance. To permit the Ninth Circuit's classification of Respondent's newsletter as commercial speech to stand

would be to alter fundamentally the constitutional protection available to a wide array of publishers, including the members of the NPA.

ARGUMENT

REGARDLESS OF HOW THE COURT RESOLVES THE VALIDITY OF THE PARTICULAR STATUTE AT ISSUE, IT SHOULD NOT RETREAT FROM ITS PREVIOUS ACKNOWLEDGMENT THAT THE SPEECH OF NEWSLETTER PUBLISHERS IS ENTITLED TO THE FULL PROTECTIONS OF THE FIRST AMENDMENT

The California statute at issue here purports to prohibit the release of certain information regarding arrestees to requesters who will use the information "directly or indirectly to sell a product or service," although the statute expressly exempts from its prohibition, *inter alia*, requests made for a "journalistic . . . purpose." Cal. Gov't Code § 6254(f)(3).

Respondent United Reporting Publishing Corp. ("United Reporting") publishes a newsletter, entitled *The 'Jailmail' Register* (the "*Register*"), that reports on various topics relevant to law enforcement and criminal defendants. *See, e.g.*, Excerpts of Record ("ER") 195-202. The newsletter also includes, as a regular feature, a "blotter" of the names and addresses of persons recently charged with various criminal offenses. ER 198, 202. United Reporting also offers an ancillary "dial up" information service through which persons may obtain such address data directly in other formats. *See id.* Concerned that the statute could be read to apply to its activities, United Reporting sought a judicial declaration that the statute violates the First Amendment.

Disregarding a long line of authority (including decisions of this Court), the Ninth Circuit rejected United

Reporting's argument that its newsletter and ancillary information service are noncommercial speech, the regulation of which is subject to strict scrutiny under the First Amendment. *United Reporting Publ'g Corp. v. California Highway Patrol*, 146 F.3d 1133, 1136 (9th Cir. 1998). Rather, the Ninth Circuit held that United Reporting's publications constitute "commercial" speech, and proceeded to declare the challenged statute invalid as a violation of the more limited rights secured to commercial speakers by the First Amendment. The NPA respectfully submits that the court below erred, not in the result it ultimately reached, but rather by classifying the newsletter and ancillary information service as commercial speech in the first instance. This error, if endorsed by this Court or simply permitted to stand unchallenged, would sweep out from the full shelter of the First Amendment a whole class of speech that this Court has recognized serves the Amendment's core values.

A. The Ninth Circuit's Unbounded Definition Of Commercial Speech Conflicts With This Court's Precedents And Would Encompass Most Newsletters As Well As Numerous Other Sources Of News And Information

As Justice Scalia observed in *Board of Trustees v. Fox*, 492 U.S. 469, 473-74 (1989), in a commercial speech case, "the first question we confront is whether the principal type of expression at issue is commercial speech." This examination must proceed "carefully," this Court has cautioned, "to ensure that speech deserving of greater constitutional protection is not inadvertently suppressed." *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983); *see also Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 504-05 (1984) (where case presents question of whether particular speech falls within category "to which the majestic protection of the

First Amendment does not extend," the "Court has regularly conducted an independent review of the record both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited").

Notwithstanding the cautious approach urged by this Court, the Ninth Circuit in this case swept into its definition of commercial speech "any 'expression related solely to the economic interests of the speaker and its audience.'" *United Reporting Publ'g Corp. v. California Highway Patrol*, 146 F.3d at 1137 (emphasis added) (quoting *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561 (1980)). In so defining commercial speech, the Ninth Circuit appears to have overlooked this Court's admonition in *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993), that, in its more recent rulings regarding the scope of the category of commercial speech, the Court "did *not* simply apply the broader definition of commercial speech advanced in *Central Hudson*," *id.* at 423 (emphasis added)—precisely the definition applied here by the Ninth Circuit. Indeed, having first adopted this sweeping definition of commercial speech, the Ninth Circuit then proceeded to characterize the speech at issue—United Reporting's newsletter and ancillary information service—as follows:

United Reporting sells arrestee information to clients; *nothing more*. Its speech can be reduced to, "I [United Reporting] will sell you [client] the X [names and addresses of arrestees] at the Y price."

Id. (emphasis added; other alterations in original). This, the Ninth Circuit held, "is a pure economic transaction

comfortably within the 'core notion' of commercial speech." *Id.* (internal citation omitted).²

The court below, however, fundamentally misconstrued the speech in which United Reporting seeks to engage. That speech is not (as the Ninth Circuit characterized it) an *advertisement or solicitation* by United Reporting for the sale of its newsletter or ancillary information service, which might fairly be termed commercial speech, but rather *the information communicated within* the newsletter and information service themselves. Such information cannot logically be characterized as a mere proposal to engage in a commercial transaction, any more than can the information contained in any book or daily newspaper sold for a price. Unlike the speech engaged in by an advertiser that is designed solely for the purpose of selling the speaker's product or service, the speech at issue here *is* the very product or service of value that United Reporting is in business to disseminate, a distinction of dispositive significance.³ The public dissemination of such in-

² The Ninth Circuit's "X for Y" formulation is derived directly from Justice Blackmun's description of the speech at issue in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976)—speech that, in the form of a price list, was plainly and exclusively an advertisement for the sale of goods:

Our pharmacist does not wish to editorialize on any subject, cultural, philosophical or political. He does not wish to report any particularly newsworthy fact, or to make generalized observations even about commercial matters. The "idea" he wishes to communicate is simply this: "I will sell you the X prescription drug at the Y price."

Id. at 761. In contrast to the speech at issue in *Virginia State Board of Pharmacy*, United Reporting does indeed wish to report newsworthy facts, and, as explained in text, the speech at issue here is no mere proposal to engage in a commercial transaction with the speaker.

³ Even if the contents of United Reporting's newsletter or its ancillary information service could somehow be characterized as a

formation simply does not constitute the kind of speech heretofore deemed to be commercial. *Argello v. City of Lincoln*, 143 F.3d 1152, 1153 (8th Cir. 1988) (quoting trial court's observation that "there is a distinct difference between the offer to tell a fortune ('I'll tell your fortune for \$20.'), which is commercial speech, and the actual telling of the fortune ('I see in your future . . .') which is not").

Rather, as this Court originally formulated it, commercial speech is expression that does "no more than propose a commercial transaction." *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973) (emphasis added). The Ninth Circuit's construction of this Court's subsequent decision in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. at 561, as announcing a different, far broader standard cannot be squared with either the language or logic of numer-

solicitation for a commercial transaction, that would not be dispositive of whether the information constitutes commercial speech. "[T]he mere fact that [materials] are . . . advertisements clearly does not compel the conclusion that they are commercial speech." *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. at 66; see also, e.g., *National Life Ins. Co. v. Phillips Publ'g, Inc.*, 793 F. Supp. 627, 645 (D. Md. 1992) (recognizing that promotional materials disseminated by a specialized financial newsletter do not constitute commercial speech); *Lane v. Random House, Inc.*, 985 F. Supp. 141, 152 (D.D.C. 1995) (noting that speech is "protected even if styled as a solicitation to purchase," court held advertisement for book is not commercial speech). Furthermore, that the newsletter may contain a reference to a specific product, i.e., the ancillary information service, "does not by itself render the [material] commercial speech." *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. at 66. And "the fact that [United Reporting] has an economic motivation for mailing the [material] would clearly be insufficient by itself to turn the materials into commercial speech." *Id.* at 67. While the combination of such characteristics can provide support for the conclusion that particular material constitutes commercial speech, *id.*, the court below engaged in no such analysis with respect to United Reporting's newsletter and service.

ous other precedents of the Court, decided both before and after *Central Hudson*. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumers Council, Inc.*, 425 U.S. 748, 761-62 (1976), for example, the Court observed four years before *Central Hudson* that speech is not commercial *merely* because it concerns only the financial interests of the recipients.

Similarly, three years after deciding *Central Hudson*, the Court in *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983), evaluated two fliers and a pamphlet concerning prophylactic products. As the Court pointed out, its earlier "decisions have recognized 'the "common-sense" distinction between *speech proposing a commercial transaction*, which occurs in an area traditionally subject to government regulation, and other varieties of speech.'" *Id.* at 64 (citation omitted) (emphasis added); see also *id.* at 65 (category of speech that is commercial is distinguished by "the greater potential for deception or confusion in the context of certain *advertising messages*") (emphasis added). As for the two advertising fliers at issue in *Bolger*, the Court explained that they were clearly "speech which does 'no more than propose a commercial transaction'" and, accordingly, were deemed commercial. *Id.* at 66 (citations omitted). The pamphlet fell into the same category notwithstanding that it discussed venereal disease because it both was intended as an advertisement to promote the sale of the speaker's prophylactic products and made specific reference to those products—in other words, the pamphlet was speech primarily intended to promote a commercial transaction between the speaker and the recipients of the speaker's message. See *id.* at 66-67; see also, e.g., *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. at 423 (observing that Court in *Bolger* did not apply *Central Hudson's* broad definition of commercial speech as that consisting of any speech related solely

to speaker's and listener's economic interests); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 494 (1995) (Stevens, J., concurring in judgment) ("[a]s a matter of common sense, any description of commercial speech that is intended to identify the category of speech entitled to less First Amendment protection should relate to the reasons for permitting broader regulation: namely, commercial speech's potential to mislead" consumers); *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 426 (1993) (commercial speech doctrine distinguishes between speech proposing a commercial transaction and other varieties of speech); *Board of Trustees v. Fox*, 492 U.S. at 473-74 ("the test for identifying commercial speech" is whether it "propose[s] a commercial transaction"); *Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1, 8-9 (1986) (Powell, J., announcing judgment) (nature of newsletter at issue "extends well beyond speech that proposes a business transaction" and thus is fully protected by First Amendment); cf. *Edenfield v. Fane*, 507 U.S. 761, 765 (1993) (acknowledging possibility that "ambiguities may exist at the margins of the category of commercial speech," but emphasizing that "solicitations" are at core of concept).

At bottom, what underlies virtually all of the Court's prior commercial speech cases is the notion that the doctrine is intended to permit limited regulation of speech directed at persuading consumers to enter into commercial transactions with the speaker. See *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978) (emphasizing that commercial speech doctrine is concerned with "speech proposing a commercial transaction"). United Reporting's speech at issue here simply does not share this fundamental characteristic. There is, therefore, no constitutional basis for characterizing the entirety of United Reporting's publications as "commercial speech," as the Ninth Circuit has done.

Indeed, if the Ninth Circuit's formulation is correct, then countless publications heretofore thought to contain core speech fully protected by the First Amendment would be recategorized as commercial speech. See P. Cameron DeVore & Robert D. Sack, *Advertising & Commercial Speech* § 2.2, at 2-10 to 2-11 (1999). For example, the newsletter *Megawatt Daily*, which includes significant news and analysis on the electric power industry of interest to its subscribers, see *infra* at 16 n.6, features in each issue tables of pricing data for electric power throughout the nation. This data undoubtedly is intended to serve the financial interests of the newsletter's readers, and is placed in the newsletter at least in part for the purpose of enhancing its value to those subscribers. Because, for these reasons, *Megawatt Daily's* speech could be characterized under the Ninth Circuit's rationale as relating solely to the economic interests of the speaker and its audience, the publication presumably would be treated as commercial speech. So too would *Inside Mortgage Finance*, see *infra* at 16 n.6, because that newsletter includes, as one of its principal features, tables of data concerning mortgage originations and mortgage purchase activity by Fannie Mae and Freddie Mac. Such data apparently would be characterized, under the Ninth Circuit's reasoning, as exclusively directed to the financial interests of the newsletter's subscribers, and because it is presumably disseminated by the newsletter for profit, would be deemed commercial speech.⁴

⁴ The list of newsletters potentially subject to being deemed commercial speech under the Ninth Circuit's formulation is lengthy. *Random Lengths* is a weekly newsletter that publishes data on the current price of numerous types of lumber around the nation, along with analysis of the lumber market. See, e.g., *OSB Output Likely to Top Plywood*, *Random Lengths*, June 18, 1999, at 1. Progressive Business Publications publishes some 22 newsletters concerned primarily with ways to better manage businesses and to

The consequences of such a reformulation of the commercial speech doctrine would not be limited to newsletters. If United Reporting's speech is deemed commercial because it sells information that facilitates the business activities of its subscribers, then virtually every daily newspaper in the nation—each of which sells raw data on the movement of stock prices, along with intelligence on the fluctuations of the market, in every issue—is subject to the same classification. No rational interpretation of this Court's commercial speech jurisprudence can support such a result. "Whatever else the category of commercial speech may encompass" beyond that which does no more than propose a commercial transaction, *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985), this Court should not permit expansion of its boundaries by mere *ipse dixit*.⁵

increase their bottom lines. Included as regular features in most of this publisher's newsletters are lists of data concerning companies that have been cited for violation of state or federal laws pertinent to the particular industry covered. See, e.g., *Roundup of Recent Wage-Hour Violations and Sanctions*, Keep up to Date on Payroll, June 18, 1999, at 4; *Roundup of Most Recent OSHA Citations for Safety Violations*, Safety Compliance Alert, June 16, 1999, at 4; *Who Got Fined—And Why*, Clean Air News, June 21, 1999, at 4; *Who Got Fined*, Environmental Compliance Alert, June 28, 1999, at 1-2. By the same token, *Guidepoints: Acupuncture in Recovery* is a monthly newsletter that features, among reports concerning this medical practice, a list of the contact names and addresses for third persons or organizations who might wish to hire acupuncturists. See, e.g., *Funding Whiffs*, *Guidepoints: Acupuncture in Recovery*, June 1999, at 8 (listing contact persons at courts receiving grants to support "drug courts" that might be interested in employing alternative therapies).

⁵ From what appears in the record, this case apparently could have been resolved by the courts below on the basis that United Reporting is engaged in activities with a "journalistic purpose" and, as such, is entitled to access to the information at issue under the express language of the statute. See Cal. Gov't Code § 6254(f)(3). Certainly, it cannot be gainsaid that newsletters and their reporters

Finally, the Ninth Circuit's error is compounded by its failure to distinguish between United Reporting's speech and the speech in which its customers may thereafter engage. Thus, for example, the United States, appearing as *amicus curiae*, contends that "[a]ddresses from arrest records are valuable to respondent (and its clients) not primarily because of their own intrinsic speech value—any fact or idea that they themselves convey—but rather because they can be used to find a particular target audience that respondent's clients want to contact." Brief for the United States as *Amicus Curiae* Supporting Petitioner at 15 (emphasis added).

While it may be true that those who subscribe to United Reporting's newsletter and ancillary information service do so at least in part because the information conveyed to them will enhance their capability to reach a particular target audience, that fact should not deprive United Reporting of the full measure of First Amendment protections to which it is otherwise entitled. This Court has never suggested that speech is deserving of lesser constitutional protection simply because the recipient may utilize it in order to further his or her commercial interests, and the consequences of such a proposition would be profound. Much of the daily grist of the nation's news—from reports on the latest economic indicators, to the political machinations of Congress and state legislatures, to developments in foreign affairs—is routinely utilized by businesses, professionals and consumers alike to facilitate and inform their decisionmaking regarding commercial transactions. The proposition that news organizations that disseminate such information are thereby entitled to a lesser degree of con-

are entitled to access to this state-controlled information on the same basis as their counterparts at daily newspapers and other press organizations. See *Lowe v. S.E.C.*, 472 U.S. 181, 205 (1985); *Branzburg v. Hayes*, 408 U.S. 665, 704 (1972).

stitutional protection than that historically afforded the press cannot be squared with this Court's First Amendment jurisprudence. *See, e.g., Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. at 513 (where consumer protection organization published critical review of new stereo loudspeaker in order to aid consumers when purchasing such equipment, speech "fit[] easily within the breathing space that gives life to the First Amendment" and publisher was entitled to invoke full limits "of the First Amendment's broad protective umbrella").

B. Newsletters Serve A Vital Informational Role And Have Without Exception Been Deemed By The Courts To Enjoy The Full Protections Of The First Amendment

Even brief consideration of the nature of newsletters as a class of periodicals serves to underscore the constitutionally unacceptable results that follow from the Ninth Circuit's reasoning. Newsletters are distinguished as a form of publication that provides information, commentary and analysis concerning a defined area of interest to subscribers in a timely and comprehensible fashion. While the diminutive phrase "newsletter" might be misconstrued to suggest that such publications are somehow less significant than daily newspapers or other publications of more general subject matter, the distinguished history of newsletter journalism readily dispels such a characterization. Because they typically limit their coverage to a particular industry, a specific aspect of governmental activity, or a single issue of common concern to their readership, newsletter publishers thereby develop unusual expertise in their area of coverage and commonly have broken major news stories in advance of larger, more visible news organizations.

Examples abound. A newsletter focused on the defense industry first reported the story that computer hackers had

penetrated the computer systems of the Air Force and Navy during a build-up of forces in the Persian Gulf. *See Pentagon Looks for Answers to Massive Computer Attack*, Defense Information & Electronics Report, Feb. 13, 1998, at 1. Only after the newsletter had published its report did the daily print and television news organizations learn of this significant event affecting the nation's security. *See, e.g.,* Susanne M. Schafer, *Hackers Attack Computer at the Pentagon*, The Associated Press, Feb. 25, 1998; Bradley Graham, *11 U.S. Military Computer Systems Breached By Hackers This Month*, Wash. Post, Feb. 26, 1998, at A1.

Similarly, a controversial doctor's questionable methods of conducting human studies of "alternative" cancer therapies were first brought to light in a medical newsletter. *See The Antineoplaston Anomaly: How a Drug Was Used For Decades in Thousands of Patients, With No Safety, Efficacy Data*, The Cancer Letter, Sept. 25, 1998, at 1. Only after *The Cancer Letter* published its report did the general press recognize the significance of the story. *See, e.g.,* Terri Langford, *Oncologists Criticize Methods of Controversial Cancer Treatment*, The Associated Press, Oct. 1, 1998 (citing "the Sept. 25 issue of The Cancer Letter, a widely read and well-respected Washington newsletter"); Shannon Brownlee, *Trial of a Cancer Doc*, U.S. News & World Report, Oct. 5, 1998, at 28, 30 (citing The Cancer Letter's report). And, just last month, Mealey Publications, Inc. was the first to report that GTE Corp. is seeking to force its insurers to cover some \$400 million in costs associated with Year 2000 computer problems. *GTE Sues 5 Insurers to Recover \$400 Million in Y2K Remediation Costs*, Mealey's Year 2000 Report Bulletin, June 30, 1999, at 1. The rest of the press followed Mealey's lead. *See, e.g.,* Barnaby J. Feder, *GTE Sues 5*

Insurers in a Bid to Spread Year 2000 Costs, N.Y. Times, July 2, 1999, at C2.⁶

United Reporting's publication, the *Register*, is a typical example of a newsletter: It provides timely information and commentary concerning a specialized area of interest, in this case, law enforcement techniques and strategies for defending against certain types of criminal charges. See, e.g., ER 195-202. The value of the *Register* to its readers is enhanced by the inclusion of data useful to them, including the addresses of persons recently arrested for certain crimes. ER 198, 202. Countless newsletters publish similar information: The *Risk Retention Reporter*, for example, publishes contact information for purveyors and consumers of insurance products, some of which it gleans from government records. *Gas Daily* publishes

⁶ See also, e.g., *Marketer Said to Renege; Midwest Prices Skyrocket*, Megawatt Daily, June 24, 1998, at 1 (newsletter focused on electric power utilities first reported story that electric power marketer was defaulting on contracts to deliver electricity to municipalities and other customers during Midwestern heat wave, ultimately driving the wholesale price of electricity up more than a hundred-fold); *OMB Director Raines Received Generous Concessions From Fannie Mae Board as He was Departing GSE*, Inside Mortgage Finance, Apr. 25, 1997, at 10 (newsletter covering mortgage financing business first reported story that Fannie Mae Vice Chairman Franklin D. Raines had received extraordinarily generous severance package when he left to head Clinton Administration's Office of Management and Budget, and that Fannie Mae had omitted his compensation package from its annual report); *Bonuses Given to Officers of PBS, Exceeding Federal Salary Cap*, Communications Daily, Dec. 24, 1997, at 3 (newsletter on telecommunications industry learned through investigative reporting that certain public broadcasting executives were receiving compensation in excess of statutory maximum, and major news organizations followed its reportorial lead. see, e.g., Paul Farhi, *House Panel Probing Salaries at NPR, PBS*, Wash. Post, Mar. 3, 1998, at C1; *Panel Eyes NPR, PBS Salaries*, Boston Globe, Mar. 3, 1998, at E8; Christopher Stern, *Congress Checks Big Bonus Report*, Variety, Feb. 3, 1998 (citing Communications Daily report)).

tables of pricing data for natural gas. And, like United Reporting, many newsletters offer ancillary information services through which subscribers can purchase additional, broader or more detailed data than is included in a particular issue of the newsletter. Rockville, Maryland-based UCG, for example, publishes close to 100 newsletters on topics ranging from energy (*Oil Express*, which provides petroleum marketing intelligence) to telecommunications (the *Buyer's Guide to ISDN*, which provides information intended to help businesses select and install communications equipment) to day care (*Day Care USA*, which provides information on federal grants available to operators of day care centers). UCG also offers numerous ancillary data services to its customers, including "CBD Online," a comprehensive listing of federal contracts and awards, and "TECOR OnLine," through which it provides customized listings of environmental-related contract opportunities. The information disseminated by UCG, like that disseminated by United Reporting, is culled largely from government records and UCG's ancillary information services are no different in kind from that provided here by United Reporting: Such services provide to subscribers information that those subscribers may, in turn, use to further their business or financial interests. Indeed, as Petitioner itself concedes, "the dissemination of information is the modus operandi of United Reporting and similar organizations." Brief for the Petitioner at 36.

This and other courts have long recognized that speakers who seek payment for their speech—the *sine qua non* of virtually all news organizations—do not thereby sacrifice their First Amendment rights. See, e.g., *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 756 n.5 (1988) ("Of course, the degree of First Amendment protection is not diminished merely because the newspaper or speech is sold rather than given away."); *Murdock v.*

Pennsylvania, 319 U.S. 105, 111 (1943) ("the mere fact that . . . religious literature is 'sold' . . . rather than 'donated' does not transform evangelism into a commercial enterprise"). Indeed, courts repeatedly have recognized that it is improper to afford a reduced level of constitutional protection to specialized publications on this basis. See, e.g., *S.E.C. v. Wall Street Publ'g Inst., Inc.*, 851 F.2d 365, 372 (D.C. Cir. 1988) ("we do not see a clear fit between the commercial speech doctrine and the [stock market] publications that the SEC here seeks to regulate"); *In re Scott Paper Co. Sec. Litig.*, 145 F.R.D. 366, 368 (E.D. Pa. 1992) (rejecting argument that Standard & Poor's credit rating circular "is not a member of the traditional newsgathering and information disseminating community" entitled to full First Amendment protection); *Citicorp v. Interbank Card Ass'n*, 4 Media L. Rep. (BNA) 1429, 1431 (S.D.N.Y. 1978) (rejecting argument that specialized financial publisher was "not entitled to any special protected status").

It is well established that the publishing activities in which newsletter publishers like United Reporting typically engage (as distinct from advertisements they may publish soliciting persons to pay for the published products) should be understood as fully protected by the First Amendment. This Court's reasoning in *Lowe v. S.E.C.*, 472 U.S. 181 (1985), a case that concerned a statutory privilege for members of the press, is illustrative. There, the petitioners "publish[ed] two investment newsletters and solicit[ed] subscriptions for a stock-chart service." *Id.* at 184. The SEC alleged in its complaint that the publisher was "engaged in the business of advising others 'as to the advisability of investing in, purchasing, or selling securities . . . and as part of a regular business . . . issuing reports concerning securities'" without having registered with the Commission to do so, in violation of

securities laws. *Id.* (quoting complaint) (alterations in original). The Second Circuit rejected the publisher's assertion that it was entitled to the full panoply of First Amendment rights, holding that his newsletters constituted "potentially deceptive commercial speech," *S.E.C. v. Lowe*, 725 F.2d 892, 901 (2d Cir. 1984) (emphasis added), and observing that the case involved "precisely the kind of regulation of commercial activity permissible under the First Amendment," *id.* at 900 (emphasis added). This Court reversed.

In holding that the registration requirements of the Investment Advisors Act of 1940 did not apply to the publisher, the Court noted that "[p]etitioners' newsletters are distributed 'for compensation and as part of a regular business' and they contain 'analyses or reports concerning securities.'" *Lowe v. S.E.C.*, 472 U.S. at 203 (citation omitted). Nevertheless, this Court concluded that the newsletters and stock-chart service at issue qualified for an exemption from the registration requirements as "bona fide newspaper[s], news magazine[s], or business or financial publication[s]," invoking the Court's oft-repeated observation:

"The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest. The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion."

Id. at 205 (emphasis added) (quoting *Lovell v. City of Griffin*, 303 U.S. 444, 451-52 (1938) (citing *Near v. Minnesota*, 283 U.S. 697, 713-16 (1931))); see also, e.g., *Branzburg v. Hayes*, 408 U.S. at 704 (informative role played by press is fulfilled by "[t]he lonely pamphleteer

who uses carbon paper or mimeograph just as much as . . . the large metropolitan publisher").

The Court held in *Lowe* that the respondent was *not* engaged in unprotected speech, but, rather, fit comfortably within the concept of the "press":

To the extent that the chart service contains factual information about past transactions and market trends, and the newsletters contain commentary on general market conditions, there can be no doubt about the protected character of the communications

.....

Id. at 210.

What this Court said of the statutory protection available to the newsletters at issue in *Lowe* applies with equal force to the constitutional protection at issue here. See *Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1 (1986). In *Pacific Gas*, a California utility published a newsletter, entitled *Progress*, that it distributed to its gas and electric customers. Although it also included political editorials and feature stories on matters of general interest, one purpose of the newsletter was to provide commercial information to the utility's customers, including, for example, information about special payment plans it offered. *Id.* at 5 & n.1. Justice Powell, writing for himself, Chief Justice Burger and Justices O'Connor and Brennan, observed:

There is no doubt that . . . appellant's newsletter *Progress* receives the full protection of the First Amendment. In appearance no different from a small newspaper, *Progress'* contents range from energy-saving tips to stories about wildlife conservation, and from billing information to recipes. *Progress* thus extends well beyond speech that proposes a business transaction, and includes the kind of discussion of

"matters of public concern" that the First Amendment both fully protects and implicitly encourages.

Id. at 8-9 (Powell, J., announcing judgment) (citations omitted) (emphasis added).

Indeed, the lower courts repeatedly have afforded newsletters the full measure of protection derived from the First Amendment. See *Lind v. Grimmer*, 30 F.3d 1115, 1117-19 (9th Cir. 1994) (concluding that newsletter constituted "fully protected speech" and applying strict First Amendment scrutiny to statute that purported to limit information publisher could disseminate); *Reuber v. Food Chem. News, Inc.*, 925 F.2d 703, 707-08 (4th Cir. 1991) (newsletter reporting on toxic chemicals entitled to full constitutional protection); *In re Petroleum Prods. Antitrust Litig.*, 680 F.2d 5, 7-8 (2d Cir. 1982) (newsletter dedicated exclusively to coverage of prices in petroleum industry entitled to assert First Amendment-based privilege against compelled disclosure of information it had gathered); *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287 (D.C. Cir. 1980) (newsletter reporting on marketing policies of supermarket industry entitled to full First Amendment protection).⁷

⁷ See also, e.g., *In re Factor VIII or IX Concentrate Blood Prods. Litig.*, 25 F. Supp. 2d 837, 840 n.4 (N.D. Ill. 1998) (organization that published newsletter conveying information to hemophiliacs about blood products was entitled to assert First Amendment-based defenses to claims based on content of newsletter); *Southwell v. Southern Poverty Law Center*, 949 F. Supp. 1303, 1304, 1314 (W.D. Mich. 1996) (publisher of newsletter that disseminated data about white supremacist groups entitled to privilege afforded by First Amendment against compelled disclosure of confidential sources); *Ginsburg v. Agora, Inc.*, 915 F. Supp. 733, 739-40 (D. Md. 1995) (although newsletter may be less recognized and may have smaller circulation than larger publications, it nevertheless is subject to same protection under First Amendment); *National Life Ins. Co. v. Phillips Publ'g, Inc.*, 793 F. Supp. at 648 (newsletter directed at financial interests of subscribers entitled to assert First Amend-

In the final analysis, United Reporting's newsletter and ancillary service, which provide information concerning the operations of law enforcement and those who have come into the criminal justice system, are no less entitled to the First Amendment's protections than is any member of the "press." See, e.g., *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982) (reports concerning law enforcement and those responsible for administering that system provide both the raw material and a catalyst for the "free discussion of governmental affairs") (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 783

ment-based defenses in defamation action); *S.E.C. v. Hirsch*, 8 Media L. Rep. (BNA) 2421, 2422 (S.D.N.Y. 1982) (financial newsletter entitled to First Amendment-based privilege against compelled disclosure of subpoenaed material); *F.E.C. v. Phillips Publ'g, Inc.*, 517 F. Supp. 1308, 1309, 1312-13 (D.D.C. 1981) (treating newsletters as "press" publications for purposes of exemption from regulatory statute); *Concerned Consumers League v. O'Neill*, 371 F. Supp. 644, 652 (E.D. Wis. 1974) (newsletter, like any newspaper, "is safeguarded by the First Amendment of the Federal Constitution relating to freedom of the press"); *Oregon v. Nachtigal*, 921 P.2d 1304, 1307-08 (Or. 1996) (publisher of newsletter reporting on financial aspects of sporting goods industry entitled to peremptory writ striking down prior restraint on publication); *Morning Star, Inc. v. Superior Court*, 29 Cal. Rptr. 2d 547, 553-58 (Ct. App. 1994) (financial newsletter entitled to assert full range of protections available under First Amendment); *In re Burnett*, 635 A.2d 1019 (N.J. Super. Ct. Law Div. 1993) (First Amendment applies to newsletter reporting on insurance management issues); *Moffatt v. Brown*, 751 P.2d 939, 941-42 (Alaska 1988) (publisher of allegedly defamatory newsletter entitled to assert full range of First Amendment protections); *In re Photo Marketing Ass'n Int'l*, 327 N.W.2d 515, 517 (Mich. Ct. App. 1982) ("the mere fact that a publication is technical in nature does not preclude the application of the First Amendment privilege against disclosure of confidential information"); *Tague v. Citizens for Law & Order, Inc.*, 142 Cal. Rptr. 689, 690 (App. Dep't Super. Ct. 1977) (noting "fundamental interests" implicated by libel suit against newsletter and permitting publisher to assert full range of constitutional defenses to defamation claim).

(1978) ("the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit the government from limiting the stock of information from which members of the public may draw"); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491-92 (1975) (American public "relies necessarily upon the press" to report on operation of government and "[g]reat responsibility is accordingly placed upon the news media" to fulfill this role); *Adey v. United Action for Animals, Inc.*, 361 F. Supp. 457 (S.D.N.Y. 1973) (fact that newsletter's circulation was limited to members of association with common interest in subject did not deprive newsletter of First Amendment protection), *aff'd*, 493 F.2d 1397 (2d Cir. 1974).

If a state or federal government seeks to prevent attorneys, drug counselors, and other citizens from communicating directly with recent arrestees, as the State of California here claims it does, then the proper course is for the government to enact laws restricting those communications directly, if it can do so consistently with the Constitution, and not to restrict the speech of United Reporting or other publishers engaged in the dissemination to the public of information that serves a far different purpose than merely proposing a commercial transaction.

CONCLUSION

For the foregoing reasons, the NPA respectfully submits that the judgment in favor of United Reporting should be affirmed, but that the constitutionally deficient reasoning adopted by the Court of Appeals should be rejected.

Respectfully submitted,

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